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90235—36

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 161

LIGGETT AND MYERS TOBACCO CO., PETITIONER

v.

THE UNITED STATES

No. 162

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

THE UNITED STATES

No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 20–26) is reported in 13 F. Supp. 143, 14 F. Supp. 543.

JURISDICTION

The judgments of the court below were entered April 6, 1936 (R. 26–27). Order overruling petitioners' motions for new trial was entered June 9, 1936 (R. 27). The petition for writs of certiorari was filed July 6, 1936 (R. 27). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Boston State Hospital is an essential governmental instrumentality of the Commonwealth of Massachusetts within the implication of the decisions of this Court which hold that the Federal Government may not impose a direct tax burden upon such instrumentalities.

STATUTE INVOLVED

The tax involved was imposed by Section 401 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as follows:

> Upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid, in lieu of the internal-revenue taxes now imposed thereon by section 401 of the Revenue

Act of 1924, a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof. (U. S. C., Title 26, Secs. 700–701.)

* * * * *

STATEMENT

The findings of fact of the Court of Claims (R. 20–22) may be summarized as follows:

On or about January 6, 1932, petitioner, Liggett and Myers Tobacco Co., received an order from the Commonwealth of Massachusetts, through its purchasing agent, for the delivery of four boxes of manufactured tobacco, totalling 96 pounds net weight, to the Boston State Hospital, owned and operated by the Commonwealth of Massachusetts in Boston (R. 21).

The established Internal Revenue practice and procedure was to affix the tobacco tax stamps required by law to be placed upon the manufactured tobacco before the tobacco was removed from the factory (R. 21). The petitioner had, in its bonded warehouse, the tobacco so ordered in packages to which such stamps, duly cancelled, had been affixed. The aggregate amount of the stamps so cancelled was $17.28 (R. 21).

Pursuant to the order received, the tobacco was delivered on about January 19, 1932, to the Boston State Hospital, and on the date of shipment the petitioner, Liggett and Myers Tobacco Co., sent a bill to the Boston State Hospital in the sum of $30.62, representing the price of the tobacco, in-

cluding the tax paid by Internal Revenue stamps. This bill was paid by the Commonwealth of Massachusetts (R. 21). The tobacco so shipped and received by the hospital was distributed free to patients thereof under the authority of the law of Massachusetts and in the course of institutional treatment of the patients (R. 21).

The Boston State Hospital is maintained by the Commonwealth of Massachusetts for care and treatment of those having mental diseases. Institutional treatment of the insane has existed for several centuries, although the early treatments were largely limited to the confinement of the violently insane. State treatment of the mentally diseased, at public expense, has existed in the United States and in the Commonwealth of Massachusetts for many years, but a few States provide practically no such facilities. The Boston State Hospital is useful in the maintenance of public welfare and order in the Commonwealth of Massachusetts and performs a useful service. The power of restraining patients is conferred upon the hospital by the State. While there are private hospitals for the care of the insane, located and operated in the State, they are conducted for profit, and the average patients do not have the means to pay their charges. In the Boston State Hospital, patients pay if they are able, but if not, they pay nothing (R. 22–23).

Claims for refund in the sum of $17.28, the amount of the stamps used in payment of the tax

on the tobacco shipped to the hospital, were filed in due time and in proper form on the ground that the tax sought to be recovered was paid on tobacco sold to the Commonwealth of Massachusetts for use in an institution owned and operated by the State as an instrumentality of government. The claims were duly rejected (R. 22).

Upon the foregoing findings of fact, the Court of Claims found in each of these cases, as a conclusion of law, that petitioners were not entitled to recover, and the petitions were dismissed (R. 22, 23).

ARGUMENT

The decision below holds that the Boston State Hospital, an institution for confinement and treatment of persons suffering from mental illness, is not such an agency or instrumentality of the State of Massachusetts as to be entitled to an exemption from Federal taxation. The Court of Claims, relying upon *South Carolina* v. *United States,* 199 U. S. 437; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, and *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, stated its conclusion as follows (R. 26):

> The operation of the hospital not being essential to the execution of the governmental functions of the State and not one which the State only could carry on, it follows that no immunity from taxation has been established * * *.

While there is authority for the principle that only functions which none but a State can carry on

are entitled to exemption from a Federal tax, the decision below may be rested solely upon the ground that the operation of the Boston State Hospital was not a usual or essentially governmental function.

The decisions of this Court indicate that the exemption from Federal taxation extends, at most, to the protection of the States, their agencies and instrumentalities only in the performance of their usual functions—those which are essentially governmental in character. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514; *Fox Film Corporation* v. *Doyal*, 286 U. S. 123; *Helvering* v. *Powers*, 293 U. S. 214. The fact that a State may be engaged in an activity or function, even if it be to the exclusion of everyone else, will not entitle it to exemption if it is thereby extending its operations beyond the usual and essentially governmental fields. *South Carolina* v. *United States, supra; Ohio* v. *Helvering*, 292 U. S. 360.

In the instant cases the agency of the State is the Boston State Hospital. It does, of course, contribute a very valuable service to the Commonwealth of Massachusetts by providing hospitalization and confinement for the insane. That fact, however, does not put it in the category of usual or essentially governmental functions. Activities of a State which are beneficial to its citizens are innumerable, but desirability is not the test. A general state hospital for treatment of all diseases

would be even more desirable, but it would clearly be not entitled to exemption. This hospital is, as the general hospital would be, in competition with private hospitals carrying on the same functions (R. 21). It is true that a large proportion of its patients are charity patients, but it does have a substantial number of patients who pay (R. 21). The hospital is not, it should be noted, a place of confinement for the criminally insane, but rather a place of institutional treatment for the mentally deranged, similar to a sanitarium for tubercular patients. It is submitted, therefore, that the conduct of a hospital such as this is not a function properly classified as a usual or essentially governmental one. *South Carolina* v. *United States, supra; Ohio* v. *Helvering; supra; Helvering* v. *Powers,* 293 U. S. 214. See *Proprietors of Mount Hope Cemetery* v. *Boston,* 158 Mass. 509, 519.

As an alternative contention it was strongly urged by the Government in the court below that irrespective of the status of the Boston State Hospital as a state instrumentality, the tax burden here imposed is too indirect and remote to be considered as any interference with or burden upon the Commonwealth of Massachusetts. Cf. *Edelman* v. *Boeing Air Transport,* 289 U. S. 249; *Wheeler Lumber Bridge & Supply Co.* v. *United States,* 281 U. S. 572; *Liggett & Myers Tobacco Co., Inc.* v. *United States,* 77 F. (2d) 65 (C. C. A. 3d), certiorari denied, 296 U. S. 580. The Court of Claims,

however, did not rest its decision upon that ground. It will not, therefore, be dealt with here, although it forms a second basis upon which recovery in the present cases should be denied.

CONCLUSION

The result reached by the Court of Claims in the present case does not conflict with any decision of this Court. The decision is correct. The petition for certiorari should be denied.

Respectfully submitted.

STANLEY REED,
Solicitor General.
ROBERT H. JACKSON,
Assistant Attorney General.
THURMAN W. ARNOLD,
J. LOUIS MONARCH,
GEORGE W. BILLINGS,
Special Assistants to the Attorney General.
CHARLES A. HORSKY,
Attorney.

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